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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, et al.,

Petitioners,

—v.—

BNSF RAILWAY COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners have alleged that Respondents conspired to raise prices in violation of federal and state laws. In the ICC Termination Act of 1995, Congress enacted (i) a limited express preemption clause stating that the remedies "with respect to regulation of rail transportation" provided by "this part" (49 U.S.C. § 10101 et seq.) are exclusive and "preempt the remedies provided under Federal and State law" (App. 64a, 49 U.S.C. § 10501(b)), and (ii) a statutory policy of the United States Government "to allow . . . competition and the demand for services to establish reasonable rates for transportation by rail," and "to ensure . . . a sound rail transportation system with effective competition . . ." (App. 62a, 49 U.S.C. § 10101(1) & (4)).

The question presented by this petition is:

Are state laws of general application not directed at rail transportation, which provide compensation to victims of unlawful price-fixing, properly preempted under a court's "purposes and objectives" analysis that does not consider (a) the plain wording of the express preemption clause (as other circuits have done), (b) the pro-competitive U.S. Government policy enacted by Congress, or (c) the statutory exception in the preemption clause for "[e]xcept as otherwise provided in this part," which elsewhere authorizes private transportation contracts that "shall not be subject to this part" (App. 69a, 49 U.S.C. § 10709(c)(1)).

PARTIES AND CORPORATE DISCLOSURE

Pursuant to Rule 14(1)(b), Fayus Enterprises, Agway Liquidating Trust, and Maroon Incorporated ("Petitioners") state:

A. List of Parties.

The parties now before the Court and before the United States Court of Appeals for the District of Columbia Circuit are as follows:

1. Petitioners:
   a. Fayus Enterprises;
   b. Agway Liquidating Trust; and
   c. Maroon Incorporated.
2. Respondents:
   a. BNSF Railway Company, Inc.;
   b. CSX Transportation, Inc.;
   c. Norfolk Southern Railway Company; and
   d. Union Pacific Railroad Company.
3. Amici: None known at time of filing.

B. Corporate Disclosure Statement.

Pursuant to Rule 29.6, Petitioners state:

Petitioner Fayus Enterprises is a California corporation with its principal place of business at 1720 N. Market Boulevard, Suite 11, Sacramento, California 95834.

Petitioner Agway Liquidating Trust is a liquidating trust established by an order of the United

States Bankruptcy Court for the Northern District of New York dated April 28, 2004. Its offices are c/o D. Clark Ogle, 308 Maltbie Street, Suite 100, Syracuse, New York 13204-1498.

Petitioner Maroon Incorporated is an Ohio corporation with its principal office at 1390 Jaycox Road, Avon, Ohio 44011.

There is no parent or publicly held company owning 10% or more of the stock of any petitioner.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS

The opinion of the United States District Court for the District of Columbia granting in part and denying in part Respondents' Motion to Dismiss is reported as *Fuel Surcharge Antitrust Litigation*, 593 F.Supp.2d 29 (D.D.C. 2008) (App. 29a). The order dismissing Petitioners' state law claims is unreported (App. 58a). The order entering final judgment on Petitioners' state law claims pursuant to Fed. R. Civ. P. 54(b) is unreported (App. 60a).

The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the District Court is reported as *Fayus Enterprises, et al., v. BNSF R. Co., et al.*, 602 F.3d 444 (D.C. Cir. Apr. 16, 2010) (App. 1a). The court's judgment (April 16, 2010) and Mandate (by endorsement, June 25, 2010) are unreported (App. 25a). The court's June 8, 2010 orders denying plaintiffs' petitions for panel rehearing (App. 27a) and for rehearing *en banc* (App. 28a) are unreported.

JURISDICTION

Rule 13.3 provides that the 90-day period for filing a petition for certiorari runs from June 8, 2010, the date of entry by the court of appeals of orders denying Petitioners' petitions for panel rehearing and rehearing en banc (App. 27a & 28a). This petition has been filed under Rule 29 within such 90-day period. This Court has jurisdiction to review the deci-

sion of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Following are the Constitutional provisions and statutes involved in the case, which are set forth in the Appendix to this Petition pursuant to Rule 14.1(f) and (i).

- United States Constitution, Art. VI, Cl. 2 (App. 62a).
- United States Code, Title 49: Transportation.
  Subtitle IV: Interstate Transportation.
  Part A: Rail.

  § 10101(1) & (4) (App. 62a).

  § 10102(5) & (9) (App. 63a).

  § 10501(b) (App. 64a).

  § 10706(a)(2) & (3) (App. 64a).

  § 10709(a), (b) & (c) (App. 69a).

STATEMENT OF THE CASE

This court has repeatedly held that, in construing the scope of an express preemption clause, courts must focus on the plain wording of the clause. The preemption clause at issue here, 49 U.S.C. § 10501(b), has been construed by other circuits in accordance with its plain wording. The court of appeals below used various legislative reports to develop its own "purposes and objectives" analysis that, if not limited by this Court, will result in widespread preemption of state laws of general application where the statute at issue contains no indication that this was Congress's intent. As other circuits have found, the plain wording of the clause indicates Congress intended to preempt only remedies with respect to *regulation* of rail transportation.

Respondents are four railroads who collectively operate more than 90 percent of all rail tracks in the United States. Petitioners, indirect purchasers of rail transportation services pursuant to private, non-tariff shipping contracts under 49 U.S.C. § 10709, allege that Respondents entered into unlawful price-fixing agreements and seek injunctive relief under federal and state antitrust law and damages under state antitrust and deceptive trade practice statutes and the common law of unjust enrichment. App. 71a & 90a (Complaint ¶¶ 1, 47). The district court denied Respondents' motion to dismiss Petitioners' federal law claims, but found Petitioners state law claims preempted. App. 29a & 58a. On appeal of the dismissal of the state law claims, the court of appeals construed the express preemption clause in 49 U.S.C. § 10501(b), in light of what it found to be Congress's

"purposes and objectives," as preempting all of Petitioners' state law claims.

The court of appeals effectively applied an implied preemption, purposes and objectives analysis to a narrow express preemption clause. The case presents this Court with an opportunity to emphasize to lower courts the importance of construing, and recognizing the limits imposed by, the specific language of an express preemption statute. A writ of certiorari should be issued.

A. Basis for Federal Jurisdiction

Federal jurisdiction over this action is founded on 15 U.S.C. §§ 15 & 26. Federal jurisdiction is also founded on 28 U.S.C. §§ 1332(d)(2) & (6) because one or more members of the putative class are citizens of a state different from one or more defendants and the aggregate amount in controversy exceeds five million dollars ($5,000,000), exclusive of interests and costs.

B. Statutory Structure

In 1980 Congress enacted the Staggers Rail Act of 1980, P.L. 94-448, 94 Stat. 1895, ending an era of almost 100 years during which railroads generally charged shippers only published tariff rates filed with the ICC.[1] The Staggers Act substantially deregulated the railroads and for the first time authorized railroads to enter into private contracts to

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[1] *See* Maureen E. Eldridge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 557-58 (2004) (summarizing regulation under the ICC and factors leading to deregulation).

provide rail transportation, with contract-set rates rather than regulated rates. 49 U.S.C. § 10713 (pre-1995), now codified as amended at 49 U.S.C. § 10709(c)(1).

In 1995 Congress enacted the ICC Termination Act of 1995, P.L. 104-88, 109 Stat. 803, which abolished the Interstate Commerce Commission ("ICC"), and created the Surface Transportation Board ("STB") within the Department of Transportation to assume what remained of the ICC's responsibilities (49 U.S.C. §§ 701-27). This appeal involves the portion of the Termination Act applicable to railroads, 49 U.S.C. §§ 10101 to 11908 ("this part" or the "Rail Part"). The Rail Part gave railroads greater freedom to price their services, and encouraged greater reliance on competition to set rates.

The preemption clause at issue is found in 49 U.S.C. § 10501(b). The jurisdiction of STB is defined generally at 49 U.S.C. § 10501(a). The first sentence of 49 U.S.C. § 10501(b), which the court of appeals referred to as the "exclusive jurisdiction clause" (App. 5a, 602 F.3d at 446), grants to the STB exclusive jurisdiction over delimited areas: (i) "transportation by rail carriers," (ii) the remedies provided by the Rail Part with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment. App. 64a.

The second sentence of 49 U.S.C. § 10501(b), which the court called the "exclusive remedies clause" (App. 5a, 602 F.3d at 446), makes preemptive the remedies provided by the Rail Part "with respect to regulation of rail transportation," a phrase added

to the exclusive remedies clause to limit the scope of preemption. See Part **B** under Reasons for Granting the Petition. The exclusive remedies clause reads:

> Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (App. 64a).

The word "transportation" is defined at 49 U.S.C. § 10102(9) (App. 63a) as facilities or equipment "related to the movement of passengers or property, or both, by rail . . ., [and] services related to that movement." App. 63a. The term "regulation," as used in the phrase "regulation of rail transportation," is not defined in the statute.

Chapter 107 of the Rail Part deals with the rate-making process. What remains of rate regulation after the ICC Termination Act is now performed by the STB. *See* 49 U.S.C. §§ 701-27 & 10704. The Act continued the deregulatory approach adopted initially in the Staggers Rail Act, under which railroads and their freight shipping customers were permitted to enter into private contracts that are not subject to rate review by the STB. 49 U.S.C. § 10709(c)(2), App. 69a.[2] Today, 80 percent or more of all rail shipments move under these unregulated private trans-

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[2] As then Judge Ginsburg wrote: "Prior to enactment of the Staggers Act, the legality of a rate agreement between shipper and carrier was less than crystal clear." *Burlington Northern R. Co. v. I.C.C.*, 679 F.2d 934, 936 (D.C. Cir. 1982).

portation contracts. App. 34a (593 F.Supp.2d at 34); App. 94a (Complaint, ¶ 56). Petitioners' purchases of rail transportation services were pursuant to these private contracts.

Section 10101 states that "the policy of the United States Government" regarding rail regulation is to allow competition to set rates, and to ensure effective competition among railroads and with other modes of transportation. 49 U.S.C. § 10101(1) & (4) (App. 62a).

C. Price-fixing Allegations Material to Questions Presented

Petitioners' complaint alleges the following facts, to be taken as true with inferences in Petitioners' favor on review of a dismissal on the pleadings. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). The district court summary of these facts appears at App. 34a-37a, 593 F.Supp.2d at 34-35.

In 2003, the four defendants, who controlled approximately 90 percent of rail freight traffic in the United States, sought to increase revenues through the use of fuel surcharges. App. 80a & 89a (Complaint ¶¶ 23, 43). For deregulated rail transportation Respondents could no longer obtain an across-the-board percentage increase of their rates from the ICC. App. 96a (Complaint ¶ 60). Recognizing the time and costs involved in renegotiating rates individually with and possibly losing their private shipping contract customers, Respondents elected to impose a percentage-based "rail fuel surcharge" to achieve an across-the-board rate increase on unregulated traffic. *Id.*

A barrier Respondents faced was that the private transportation contracts under which most rail freight was transported already had rate-escalation provisions for increases in fuel costs, based on an All Inclusive Index (the "AII") published by the Association of American Railroads (the "AAR"). App. 72a, 96a & 100a (Complaint ¶¶ 3, 61 & 70). Respondents agreed among themselves to resolve this issue by using the AAR, which they dominate and control, to create a new index that did not include fuel costs, which would allow the Respondents to impose a new, percentage-based, stand-alone fuel surcharge in a coordinated fashion across their customer base. App. 75a-77a, 96a-98a, 100a-101a (Complaint ¶¶ 10-17, 60-65, 70-72). The agreement to remove fuel from the AII and RCAF took place in the fall of 2003, when the AAR, at Respondents' behest, published the new index, the All Inclusive Index Less Fuel (the "AII-LF").

After removing fuel from the then-prevailing cost escalation indexes, the Railroads began to assess stand-alone fuel surcharges on a widespread basis and in a coordinated manner. App. 76a-78a, 101a-03a, 105a (Complaint ¶¶ 14, 16, 18, 73, 75, 81). Respondents applied broadly across various private transportation contracts a fuel surcharge percentage to the entire freight rate, notwithstanding that fuel only accounts for a portion of the costs of the shipment. *Id.* Through collective action, Respondents used the stand-alone fuel surcharge as a way to increase revenue beyond the real increased cost of fuel, not simply capture increases in fuel costs. App. 105a-06a, 112a (Complaint 81-83, 91). *Id.*

Respondents agreed among themselves not to negotiate discounts on their fuel surcharges and overall contract rates, even though prior to mid-2003 the custom had been for railroads to do so. App. 114a, 116a, 117a (Complaint ¶¶ 94, 98, 101). They also agreed among themselves not to undercut each other's pricing or to take market share from each other. App. 78a, 105a, 117a (Complaint ¶¶ 20, 81, 101). As a consequence, Respondents' respective market shares remained stable throughout the period of the conspiracy. App. 117a (Complaint ¶ 101).

D. Decisions of the District Court

Eighteen class action lawsuits alleging that the railroads' conduct violated the antitrust laws were consolidated by the Multidistrict Litigation Panel and transferred to the district court. Two putative classes were created for purchasers of rail services pursuant to private transportation contracts, one for direct purchasers and one for indirect purchasers. App. 30a, 593 F.Supp.2d at 32. Regarding the direct purchasers complaint, the district court denied Respondents' motion to dismiss, holding that the direct purchasers had satisfied the pleading standards under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), App. 38a, 593 F.Supp.2d 35-36; see *In re Rail Freight Fuel Surcharge Antitrust Litigation* 587 F.Supp.2d 27, 32-34 (D.D.C. 2008) (denial of motion to dismiss claims of direct purchasers).

Regarding the indirect purchasers' complaint, the district court sustained the pleading of both the federal and state antitrust claims as sufficient under *Twombly*, finding that Petitioners' complaint identi-

fies Respondents' supra-competitive prices and alleges an injury to competition that "is precisely that sort of injury that the antitrust laws are intended to protect against." App. 38a-39a, 52a, 593 F.Supp.2d at 35-36, 41-42. The court sustained Petitioners' pleading of standing, injury and causation, and upheld Petitioners claims for injunctive relief under the federal antitrust laws. App. 38a, 50a-57a, 593 F.Supp.2d at 35, 41-43. No appeal was taken challenging these rulings.

The court determined, however, that 49 U.S.C. § 10501(b) manifested "Congress's intent to preempt state regulatory authority over railroad operations," and dismissed Petitioners' state law claims as preempted. App. 40a-41a, 593 F.Supp.2d at 36-37. On Petitioners' unopposed motion, the district court entered final judgment on their state law claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. 60a. A timely appeal to the court of appeals followed. Proceedings on petitioners' federal law claim were stayed pending the appeal. App. 60a.

E. Decisions of the Court of Appeals

The court of appeals affirmed the dismissal of Petitioners' state law claims, finding that the state antitrust, deceptive trade practice and unjust enrichment laws at issue were preempted by 49 U.S.C. § 10501(b). The court reached this conclusion, however, not by construing the plain wording of the express preemption clause, which would have required the conclusion that the preempted laws provided "remedies with respect to regulation of rail transportation," or by referring to the statutory defi-

nition of "transportation" (49 U.S.C. § 10102(9)), or even by drawing on the case law construing the term "regulation." Rather, the court found implied in statute and the case law that these state laws were preempted because they related to the "relationship of shippers and carriers," which constituted "economic regulation" within "the core of ICCTA preemption." App. 16a-17a, 602 F.3d at 451. The court of appeals identified no statutory source for these terms.

Disregarding the narrow and specific language of 49 U.S.C. § 10501(b), the court concluded that "Congress sought to avert the sort of *frustration of its deregulatory purpose* potentially inflicted by state rights and remedies . . . ," and that application of "plaintiffs' state law claims would directly *interfere with the ICCTA's deregulatory objectives.*" App. 19a & 20a, 603 F.3d at 452 (emphasis added). The court based this conclusion not on the preemption language Congress enacted, but on selected quotations from various reports of Congressional committees over a period of fifteen years, only one of which addressed the full preemption clause.[3]

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[3] The court cited here (App. 18a) Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov. 6, 1995), reprinted in 1995 U.S.C.C.A.N. 793 **(the "House Report")**, and House-Senate Committee of Conference, ICC Termination Act of 1995, H.R Rep. 104-422 (Dec. 18, 1995), reprinted in 1995 U.S.C C.A.N. 850 **(the "Conf. Report")**, the Conference Committee report that accompanied the final bill enacted by Congress. The third and fourth reports the court cited were Congressional committee reports from 15 years earlier, prepared in connection with the Staggers Act of 1980. App. 18a, citing House-Senate

The central issue presented by this appeal is the proper application of the exclusive remedies clause added to 49 U.S.C.§ 10501(b) in 1995, and particularly a limiting phrase Congress added in the last draft bill that only remedies "with respect to regulation of rail transportation" would have preemptive effect. What is notable about the court of appeals' analysis of Congress's purposes and objectives is its reliance on these four legislative reports rather than the plain wording of the preemption clause enacted by Congress. App. 18a & n.4, 602 F.3d at 451-52.

Of the four reports, two were from 1980, fifteen years before the exclusive remedies clause was proposed. The third was the initial House Report for the ICC Termination Act, and the passage cited by the court addressed the exclusive jurisdiction clause *before the exclusive remedies clause was added to it*.

Only the fourth report, the Conference Report that accompanied the last draft bill, refers to the exclusive remedies clause as actually enacted, *i.e.*, with the limiting phrase "with respect to regulation of rail transportation." This fourth report explains that the limiting phrase was added to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation - not State and Federal law generally" (Conf. Report at 167). Rather than acknowledge this explanation, however, the court of appeals cited the

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Committee of Conference, Staggers Rail Act of 1980, H.R. Conf. Rep. 96-1430 (Sept. 29, 1980), reprinted in 1980 U.S.C.C.A.N. 4110, and Senate Commerce, Science & Transportation Committee, Staggers Rail Act of 1980, S. Rep. 96-470 (Dec. 7, 1979) (not reprinted in U.S.C.C.A.N.)

immediately following sentence, in which the committee noted, by way of example and not limitation, that certain state criminal statutes were not preempted. App. at 18a, 602 F.3d at 451, citing Conf. Report at 167.

In assigning to Congress purposes and objectives not expressed in the preemption clause itself, the court of appeals failed to examine the most credible evidence of congressional intent – the statutory language including the statement of the "policy of the United States Government" to allow "competition and the demand for services to establish reasonable rates, . . . [and] to ensure . . . effective competition among rail carriers and with other modes . . . ." 49 U.S.C. § 10101(1) & (4) (App. 62a).

REASONS FOR GRANTING THE PETITION

The court of appeals determined Congress's "purposes and objectives" relying not on statutory language, but on "snippet[s] of legislative history . . . in no way anchored in the text of the statute" (*United States v. Gonzales*, 520 U.S. 1, 6 (1997)). The central question presented is whether state laws of general application, not directed at the railroads or their operations, are preempted by the remedies provided under the Rail Part "with respect to regulation of rail transportation." That question should be -- and in other circuits has been -- answered by the plain wording of 49 U.S.C. § 10501(b). Rather than looking to the preemptive clause as enacted, the court of appeals cited four legislative reports to reach a conclusion that state laws might result in a "sort of frustration of [Congress's] deregulatory purpose"

(App. 18a-19a) or "interfere with the ICC Termination Act's deregulatory objectives" (App. 20a).

In *Geier*, this Court concluded that state common law tort actions could survive an express preemption clause but still be preempted "where an actual conflict with a federal objective is at stake." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000). *Geier's* use of an implied preemption, "purposes and objectives" analysis for a statute containing an express preemption clause, however, was in circumstances where the preemptive federal regulations affirmatively encouraged the adoption of diverse forms of passive restraints in automobiles, and where a state common law duty of care imposing liability for not using one of those forms would limit the choice provided by the federal regulations.

The circumstances here are entirely different. The ICC Termination Act was designed to establish a narrow set of exclusively federal remedies "with respect to regulation of rail transportation," not to establish a flexible standard giving railroads a variety of means by which to comply with federal requirements. Finding preemption based on the court's view of Congress's "purposes and objectives," based on a selective reading of legislative history without reference to the intended preemptive scope evidenced by the plain wording of the express preemption provision, is a misguided application of implied preemption concepts.

The court of appeals' methodological error is important. This Court's precedents establish that unambiguous preemption language in federal

statutes should be a decisive factor in both the express and implied preemption inquiries. The court of appeals here did not give the express preemptive language the required weight in the preemption analysis. That error increasingly plagues lower court analysis of implied preemption issues under statutes that contain express preemption language. This Petition presents the Court with the opportunity to issue critical guidance to lower courts on the importance of relying first and foremost on the plain wording of federal preemption provisions—the best evidence of Congress's preemptive intent—in determining the preemptive scope of federal enactments in every category of preemption inquiry. Regardless of how decisions are described in legislative reports, "courts must still ask whether the statute reflects that decision."[4]

A. The Court of Appeals' Purposes and Objectives Analysis Broadened an Express Preemption Clause Beyond What Congress Enacted

This Court has long instructed that any inquiry into the scope of preemption must be "guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group v. Good*, __, U.S. __, 129 S.Ct. 538, 543 (2008), quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).[5]

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[4] Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 285-87 (2000).

[5] "[P]reemption is not an automatic byproduct of the national legislative process; Congress must intend preemption alongside the other substantive effects of the statute." Garrick B.

When a statute contains an express preemption clause, a question may remain "of the substance and scope of Congress' displacement of state law"; however, the statutory language must still be the starting point of the inquiry. *Id.*

> If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance *focus on the plain wording of the clause*, which necessarily contains the best evidence of Congress's pre-emptive intent.

CSX Transp. v. Easterwood, 507 U.S. 658, 664 (1993) (emphasis added); *see Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (same); *Franks Invsmt. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 408 (5th Cir. *en banc*, Jan. 10, 2010) (citing *CSX v. Easterwood* in construing 49 U.S.C. § 10501(b)).

An express preemption clause also must be read to give "actual meaning" to its "literal language." *Geier*, 529 U.S. at 868. This Court held in *Geier* that where "[t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions" a savings clause would preserve, the preemption clause should be given that narrow reading. Here the court is presented with an express preemption clause in which preemptive remedies were, late in the drafting process, specifically limited to those "with respect to regulation of rail transportation." This express preemption clause also should be read

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Pursley, *The Structure of Preemption Decisions*, 85 Neb. L. Rev. 912, 940 (2007)

narrowly to give actual meaning to the added literal language. *Geier*, 529 U.S. at 868.

The plain wording of 49 U.S.C. § 10501(b), as the court of appeals noted (App. 5a, 602 F.3d at 446), indicates that Congress used it to address two distinct concepts. The first, the exclusive jurisdiction clause, existed in a more limited form before the ICC Termination Act, as 49 U.S.C. § 10501(d) (pre-1995) (referring to the ICC rather than the STB, and with the exclusive jurisdiction, as discussed below, shared with state agencies authorized by statute). House Report at 171 (showing former 49 U.S.C. § 10501(d)). The second concept, the exclusive remedies clause, was added in 1995 by modifying what previously had been a savings clause. The court of appeals' statement that this new clause "was merely a reorganization of pre-1995 law" was fundamentally incorrect, as demonstrated by the clause's evolution.

Before 1995 what became the exclusive remedies clause was a savings clause, which read:

> **Section 10103. Remedies as Cumulative.**
>
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

49 U.S.C. § 10103 (pre-1995); see House Report at 148. The change proposed in the initial House bill was the polar opposite: "Cumulative" became "exclusive," and the term "preempt" appeared for the first time. (These are the changes that the court of

appeals concluded were "merely a reorganization of pre-1995 law . . . ." App. 13a (602 F.3d at 449)).

> **Section 10103. Remedies are Exclusive.**
>
> Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State law.

House Report at 373 (quoting § 10103 from the proposed bill, before the additional limiting phrase "with respect to regulation of rail transportation" was added and before Section 10103 was moved to 49 U.S.C. § 10501(b)).

Prior to the ICC Termination Act, certain authorized state agencies were said to share "exclusive jurisdiction" with the ICC for the administration of the Interstate Commerce Act predecessor of the Rail Part. 49 U.S.C. § 10501(d) (pre-1995) ("The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized . . .) over transportation by rail carriers . . . is exclusive."); *see* House Report 104-311 at 17 (former statute). The House Report noted that the proposed change in statutory language proposed in this draft bill eliminated this cooperative approach.[6]

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[6] The court of appeals' confusion of the pre-1995 shared exclusive jurisdiction of federal and authorized state agencies with the exclusivity of remedies also led to its holding that pre-1995 authorities supported overriding the statutory exception in the remedies clause, drafted in 1995, under which remedies with respect to regulation of rail transportation are preemptive "except as otherwise provided by this part." 49 U.S.C. § 10501(b), App. 64a; App. 10a-13a, 602 F.3d at 448-49. A

This new exclusive remedies clause was initially a stand-alone section in the "General Provisions" chapter (Chapter 101) of the statute, not the jurisdictional chapter (Chapter 105) where the exclusive jurisdiction clause appears. *See* House Report at 143-48. In the final bill the clause was moved to the jurisdictional chapter and integrated with the exclusive jurisdiction clause; the two together became 49 U.S.C. § 10501(b). As reported out by the Conference Committee, the important limiting phrase was added to the Exclusive Remedies clause:

> Except as otherwise provided in this part, the remedies provided under this part *with*

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counterpart provision appears in 49 U.S.C. § 10709(c)(1) (App. 69a), which states that private contracts "shall not be subject to this part." While more appropriately addressed in a briefing on the merits, for purposes of this petition what is notable is the court of appeals finding that before 1995 the exclusive jurisdiction clause (49 U.S.C. § 10501(d) (pre-1995)) had broad preemptive effect that overrode the statutory exception, when in fact the clause only provided exclusive jurisdiction over three delimited areas: (i) "transportation by rail carriers," (ii) the remedies provided by the Rail Part with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment. 49 U.S.C. § 10501(d) (pre-1995); see House Report at 171. *People v. Conrail*, 613 N.E.2d 784 (Ill. App. 1993), cited by the court of appeals as an exception because it involved "state environmental regulation" (a concept nowhere mentioned in the statute), in fact illustrates the rule because it is not within the three delimited areas, while the other cases cited by the court plainly were. App. 10a (602 F.3d at 448), citing *G. & T. Terminal Packaging v. Consolidated Rail*, 830 F.2d 1230 (3d Cir. 1987) (rate discrimination claim), and *Gendron v. Chicago & N.W. Transp. Co.*, 564 N.E.2d 1207 (Ill. 1990) (transfer of rail line)

> *respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

Conf. Report at 6 (with emphasis added to the new limiting phrase).

This exclusive remedies clause is the only place in the statute where the word "preempt" is found. What has preemptive effect are only those remedies provided by the Rail Part "with respect to regulation of rail transportation." "Transportation" is defined in the statute as facilities or equipment "related to the movement of passengers or property, or both, by rail . . . , [and] services related to that movement . . . ." 49 U.S.C. § 10102(9) (App. 63a). The term "regulation" is not defined in the statute, but two circuit courts of appeals have equated "regulation" with "managing or governing." *Franks Invstmt. Co. v. Union Pacific R. Co.*, 593 F.3d 404, 410 (5th Cir., Jan. 6, 2010); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

A court construing this preemption clause need look no further than its plain wording. To determine whether a state law is expressly preempted, a court must determine whether it constitutes a "remedy with respect to regulation of rail transportation." Reference to legislative history—though unnecessary to apply this clear statutory language—underscores the narrowness of the express preemption provision. The Conference Report emphasized that the quoted phrase was intended to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation -

- not State and Federal law generally." Conf. Report at 167.

The court of appeals, however, neither referred to the statutory definition of "transportation" nor considered how other courts have defined "regulation." While acknowledging that the exclusive remedies clause was added in 1995, the court dismissed it as "merely a reorganization of prior law, under which federal remedies with respect to rail transportation were already exclusive . . . ." App. 13a (602 F.3d at 449). Avoiding the clarifying phrase Congress used in the statute, as well as Congress's explanation of that phrase, the court of appeals speculated that Congress "sought to avert the sort of frustration of its deregulatory purpose," finding evidence of what Congress sought not in the statute but in four legislative reports. Three of these reports addressed draft bills that did not even contain the exclusive remedies clause -- two of the three were from fifteen years prior to the ICC Termination Act. The fourth report at least addressed the statute, but the court cited not Congress's clarification, but rather the sentence that following providing a non-exclusive example of unpreempted state law. App. 18a-19a, (602 F.3d at 452), citing Conf. Report at 167; see pp. **12-13** above. The court also argued that Petitioners' state law claims would "interfere with the ICC Termination Act's deregulatory objectives," but failed to cite the limits Congress placed on the preemptive scope of 49 U.S.C. 10501(b)

Finally, the court drew a general conclusion that "the core of ICC Termination Act preemption is 'economic regulation,'" which the court took "to refer to

regulation of the relationship . . . of shippers and carriers." App. 17a, 602 F.2d at 451. These terms, "core of preemption," "economic regulation" and "relationship of shippers and carriers" are nice turns of phrase, but they have no source in the statute.

The critical problem with the court of appeals' reliance on legislative history is more than just using quotable snippets not anchored to the statutory text; the court simply failed to address the statutory concept "with respect to regulation of rail transportation." The decision is an example of lower courts using a "vague and potentially boundless doctrine of purposes and objective pre-emption" in order to

> pre-empt[ ] state law based on its interpretation of broad federal policy objectives, legislative history, a generalized notions of congressional purposes that are not contained within the text of federal law.

Wyeth __ *U.S.* __, 129 S.Ct. at 1207 (Thomas, J., concurring).

By way of contrast, the Fifth Circuit construed 49 U.S.C. § 10501(b) without referring once to the ICC Termination Act's legislative history. The word "regulation," the Fifth Circuit said, was the "word being fought over in this case and in the precedents." *Franks Invstmt.*, 593 F.3d at 410. Its conclusion, followed the "plain wording" approach of *CSX v. Easterwood*, 507 U.S. at 664, was that:

> The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or

> governing rail transportation will be expressly preempted.

Franks Invsmt., 593 F.3d at 410.

"Regulation" is also the word fought over in this case. The scope of preemption under 49 U.S.C. § 10501(b) should be determined by the plain wording of the statute, and this Court should use this case to emphasize to lower courts that they must consider that the plain wording of express preemption clauses to be the best evidence of Congress's preemptive intent.

B. The Court of Appeals' Expansive Definition of "Regulation" is Without Statutory Basis and Conflicts with Other Circuits

That the adjectival phrase "with respect to regulation of rail transportation" was added to the exclusive remedies clause to limit the preemptive effect of "the remedies provided under this part" (the Rail Part) is readily apparent, from both the plain wording of the clause and the drafting history. Further, the House-Senate Conference Committee said the limiting phrase was added to "clarify[ ] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." Conf. Report at 167. The court of appeals, however, gave the concept of "regulation of rail transportation" a reading far broader than that given by other circuits, equating it first with the non-statutory concept of "economic regulation," and then virtually anything affecting "the relationship of shippers and carriers." App. 17a, 602 F.3d at 451.

The court of appeals' expansive definition of "regulation of rail transportation" is also inconsistent with the development of the ICC Termination Act. Congress wanted to create a uniform federal scheme of regulation specifically designed to govern the commercial operations of railroads. See App. 19a. A state law purporting to set the maximum rate a railroad may charge for rail transportation, for example, is inconsistent with that purpose. But there is no authority for the proposition that Congress also intended to exempt railroads from generally applicable state laws that apply to all commercial actors equally and that are designed to promote traditional state government goals such as health, safety, and public welfare.

The state antitrust, deceptive trade practices and unjust enrichment laws from which Petitioners' claims arise are this type of laws of general application. Though they incidentally may *become* applicable to a railroad if a railroad violates their requirements, in light of Congress's emphasis on "regulation of rail transportation" and its narrow definition of "transportation," it is inappropriate to characterize such generally applicable laws as preempted state regulation. But that is the effect of the court of appeals analysis.

In the recent *Franks Invstmt.* decision the Fifth Circuit *en banc* vacated a panel decision and reversed a district court for the same type of broad reading of the limiting phrase "with respect to regulation of rail transportation" that the court of appeals provided.

> [T]he remedies that are preempted are those "provided under Federal or State law," but those remedies receive their meaning from the earlier part of the sentence. To the extent remedies are provided under laws *that have the effect of regulating rail transportation*, they are preempted.

Franks Invstmt., 593 F.3d at 410 (original emphasis) The Fifth Circuit accepted that matters within the exclusive jurisdiction of the STB were "categorically" or "facially" preempted. These include state actions such as permitting or preclearance for operations already authorized by the STB, or "matters directly regulated by the [STB] -- such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and services." *Franks Invstmt.*, 593 F.3d at 410-11. (The Fifth Circuit's description tracks the three areas under the STB's exclusive jurisdiction in the above Statutory Summary, Part **B** under Statement of the Case.)

The Fifth Circuit, however, found that the second category of actions, arising under the exclusive remedies clause and "not in the nature of regulation governed by the exclusive jurisdiction of the STB," present a different preemption question: Does the challenged law regulate rail transportation or is it a law of general application that only incidentally affects rail transportation.

In *Franks Invstmt.* a private landowner challenged a railroad's closing of private crossings under state real property law. The district court had found

that the property law was preempted by 49 U.S.C. § 10501(b) and a panel of the Fifth Circuit affirmed. In reversing, the Fifth Circuit *en banc,* analyzed the plain wording of 49 U.S.C. § 10501(b) and defined the relevant question as:

> [W]hether *Franks's* railroad crossing dispute invokes laws that have the effect of managing or governing, and not merely incidentally affecting, rail transportation. It does not.

Franks Invstmt., 593 F.3d at 411 (emphasis added). Finding that the law at issue "had nothing to do with railroad[s]," the Fifth Circuit concludes that the laws at issue "are not meant to regulate railroad transportation, although at times they may have an incidental effect on railroad transportation." *Id.*

In contrast to the tortured purposes and objectives analysis of the court of appeals in the present case, the Fifth Circuit analyzed the preemption clause of 49 U.S.C. § 10501(b) simply by looking at the plain wording of the statute.

> Congress narrowly tailored the ICC Termination Act pre-emption provision to displace only 'regulation,' *i.e.*, those state laws that may reasonably be said to have the effect of manag[ing] or govern[ing] rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

Franks Invstmt., 593 F.3d at 410 (Fifth Circuit's edits), quoting *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

The *Franks Invsmt.* case is of particular significance because it was an *en banc* decision reversing a panel decision on the specific issue presented here: what constitutes "regulation of rail transportation." Notwithstanding that the issue was the same, the court of appeals seemed determined not to consider it. The decision was issued after completion of briefing for the court of appeals, and Petitioners submitted it to the court of appeals before oral argument pursuant to FRAP 28(j).[7] The court cited the decision, however, only on an issue of deference to a federal agency decision, and not on the issue for which it was submitted. App. 6a, 602 F.3d at 446-47.

In *Fla. E. Coast Ry.*, cited by the Fifth Circuit in *Franks Invstmt*, the Eleventh Circuit emphasized that the exclusive remedies clause gave preemptive effect to the remedies provided in the Rail Part "with respect to *regulation* of rail transportation" *Fla. E. Coast Ry.*, 266 F.3d at 1331 (original emphasis). A railroad had ceased using rail property as a switching and freight yard, and leased it to a non-railroad lessee. The City of West Palm Beach alleged that zoning laws did not permit commercial use. The railroad argued that the zoning laws were preempted by the ICC Termination Act. The Eleventh Circuit

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[7] Petitioners' submission to the court of appeals pursuant to FRAP 28(j) was filed electronically on Jan. 21, 2010, and is available at http://ecf.cadc.uscourts.gov/cmecf, Docket No. 09-7023.

found that, since the activities of the lessee did not relate to "transportation by rail carriers," the exclusive jurisdiction was not implicated. Under the exclusive remedies clause, the Eleventh Circuit held that "existing zoning ordinances of general applicability," enforced with respect to property owned by a railroad but leased "for non-rail transportation purposes," did not constitute "regulation of rail transportation."

> The ICC Termination Act pre-emption provision does not preclude the application of "all other law." . . . Rather, express pre-emption applies only to state laws "with respect to *regulation* of rail transportation." 49 U.S.C. § 10501(b) [quoting from the exclusive remedies clause, with the court's emphasis]. This necessarily means something qualitatively different from laws "with respect to rail transportation." . . .

266 F.3d at 1331. Looking to the plain wording of the statute, the Eleventh Circuit concluded, in language quoted by the Fifth Circuit (in the second-preceding indented quotation), that Congress had "narrowly tailored" 49 U.S.C. § 10501(b) "to displace only 'regulation,' . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation." 266 F.3d at 1331; *Franks Invstmt.*, 593 F.3d at 410.

In its citation to a legislative report for the proposition that "Congress sought to avert the sort of frustration of its deregulatory purpose" that state laws might inflict, the court of appeals noted that the

report was "addressing a bill that lacks the phrase 'with respect to rail transportation' . . . ." App. 19a, n.5 (602 F.3d at 452 n.5). The phrase that was lacking, however was "with respect to *regulation of* rail transportation." As the Eleventh Circuit stated, the phrase without the words "regulation of" means something "qualitatively different." 266 F.3d at 1331. The court of appeals found the limiting phrase to be inconsequential with or without the words "regulated," based on its reading of the legislative report.

This casual disregard of statutory language in favor of a snippet from the legislative report illustrates the danger of applying a purposes and objectives analysis, particularly to an express preemption clause. The court found a deregulatory purpose from an initial legislative report, and ignored a later Congressional addition of a limiting phrase to the statute, for the direct purpose (expressed in a later legislative report) of "clarifying that the exclusivity is limited to remedies with respect to rail regulation." Conf. Report at 167.

> Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective "purpose and objectives" may be naïve, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.

Caleb Nelson, *Preemption*, 86 Va. L. Rev. at 279-80. As this author also noted, "even if courts can learn

exactly how far members of the enacting Congress would have liked to carry the purposes behind a particular statute, *courts must still ask whether the statute reflects that decision . . .*" *Id.* at 285-86 (emphasis added). The court of appeals did not.

The statutory language, including the definition of "transportation" and a definition of "regulation" derived from its context in the statute, limits preemption under 49 U.S.C. § 10501(b) to laws purporting to manage and govern the movement of freight and the tracks over which that freight is moved. The scope of preemption found by the court of appeals, based on ignoring the statutory phrase "regulation of rail transportation," is far beyond the statute. Clarification by this Court is of crucial importance to emphasize the primacy of statutory preemptive language, to resolve the conflict among the circuits, and to avoid the use of preemption law to protect unlawful price-fixing agreements.

C. The Court of Appeals Failed to Apply the Presumption Against Preemption

The question presented in this Petition deals not with what Congress can do in terms of preemption, but what it has done. Since the 1930's congressional power under the Commerce Clause essentially has meant that "no area of intrastate commerce would be open to the states to regulate which at the same time is constitutionally closed to Congress; no such area remained fully protected from the threat of congressional intervention." Stephen A. Gardbaum, *The Nature of Preemption*, 76 Cornell L. Rev. 767, 806 (1994). Under the post 1930's construction of the

Commerce Clause, however, this Court also has recognized that Congress must manifest its intent to preempt state law. *Id.*

> [S]tate powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress. Preemption doctrine was thus modified [beginning in the 1930's] to reflect this new presumption, and thereafter, Congress was affirmatively required to manifest an intent to preempt.

Id. at 806, citing *Mintz v. Baldwin*, 289 U.S. 346 (1933), and *Rice v. Santa Fe Elevator*, 331 U.S. 218 (1947). This presumption against preemption and the requirement that Congress indicate its preemptive intent are the "two cornerstones of our pre-emption jurisprudence." *Wyeth v. Levine*, __ U.S. __, 129 S.Ct. at 1194-95.

The presumption against preemption is based on an understanding that the structural and political safeguards are the primary mechanisms for protecting states against federal encroachment on their laws.

> [S]tate interests are represented in Congress through individual members, who are politically accountable to their in-state constituents. If a proposed bill frames preemption and other federalism issues clearly and explicitly through the use of unambiguous text, then members interested in defending state interests will be capable of doing so in the legislative process. If members fail to protect state interests held dear to

> their constituents, they will be held accountable at the polls.

Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 Ecology L.Q. 1147, 1186-87 (2007). As the author noted, this "clear statement" approach to finding preemption forces members of Congress "to carefully weigh the abrogation of state interests against the political consequences." *Id.*[8]

Under this approach, where Congress has enacted an express preemption clause, the statutory language must have primacy as the place to look for the expression of congressional intent -- unlike selective quotations of legislative history on which the court of appeals relied, the statutory language must reflect the compromises reached by representatives of state interests in their lawmaking functions. As this Court has noted:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protec-

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[8] Unlike legislation, Committee reports cited as indicating congressional intent are not approved by a congressional vote.

> [T]he central aspects of preemption doctrine rely on process mechanisms -- in this case, soft rules of statutory construction -- to do their work. The presumption against preemption tends to enhance the political safeguards of federalism by requiring clear notice to legislators when state authority is at stake
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> . . . .

Ernest R. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 132 (2004).

> tion of states against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1992) (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and quoting Lawrence Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)).

Franks Invstmt. and *Fla. E. Coast Ry.* are both significant in how they address the presumption against preemption in applying 49 U.S.C. § 10501(b). *Franks Invstmt.* recognized the two cornerstones of preemption jurisprudence described above, discussed the presumption against preemption, but found no need to apply it because the exclusive remedies clause *on its face* indicated that Congress did not intend to preempt the state law at issue. *Franks Invstmt.*, 593 F.3d at 408. "The text of § 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." 593 F.3d at 410-11.[9]

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[9] The Fifth Circuit did not that "when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Franks Invstmt.*, 593 F. 3d at 407, citing *Altria Group*, __ U.S.

Unlike the Fifth Circuit, in *Fla. E. Coast Ry.* the Eleventh Circuit *did* apply the presumption against preemption. Supremacy clause decisions, the Eleventh Circuit stated, start with "the basic assumption that Congress did not intend to displace state law," an assumption based on "principles of federalism, including the recognition that the States are independent sovereigns in our federal system." *Fla. E. Coast Ry.*, 266 F.3d at 1327-28, citing *Bldg. & Con. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993), and *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

> Reliance on the presumption against pre-emption limits congressional intrusion into the States traditional prerogatives and general authority to regulate for the health and welfare of their citizens .... Thus, if the statute's terms could be read sensibly not to have a pre-emptive effect, the presumption controls and no-preemption may be inferred.

Fla. E. Coast Ry., 266 F.3d at 1328, citing *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 116-17 (1992) (internal quote marks and brackets omitted). Finding the zoning ordinance at issue entitled to a "presumption of validity under the Supremacy Clause," the Eleventh Circuit concluded that 49 U.S.C. § 10501(b) did not overcome the presumption against preemption. 266 F.3d at 1328-29.

__, 129 S.Ct at 543, and *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (internal quote marks omitted).

In the present case, the court of appeals did not even pay lip service to the presumption against preemption -- there is not a single reference to it in the decision. The court instead reviewed a series of cases and dismissed them as exceptions to the exclusive remedies clause (as broadened by the court through its purposes and objectives analysis). The court defined these exceptions as "exercises of police powers relating to public health or safety," which were not preempted unless those exercises were "either discriminatory or unduly burdensome." App. 16a, 602 F.3d at 451. Instead of looking at the statutory language to find the limits of congressional preemptive intent, the court casually drew from these cases the "implication . . . that the core of ICC Termination Act preemption is 'economic regulation,'" which the court then concluded encompassed "regulation of the relationship before us here, that of shippers and carriers." App. 16a-17a, 602 F.3d at 451.

The court's dismissal of the analysis in the cases finding no preemption was on the distinction that "railroad-shipper transactions" were "a problem quite different from environmental regulation." *Id.* The problem with the distinction the court drew, however, is that neither "railroad-shipper transactions" nor "environmental regulation" are terms used in the preemption clause. Applying the presumption against preemption to the facts of this case would have forced the court to hold that laws of general applicability against price-fixing agreements provide remedies that manage or govern ("regulation of") the use of facilities or equipment related to the movement of people or property by rail ("transportation")

and are preempted under 49 U.S.C. § 10501(b). That such laws are not preemptive under 49 U.S.C. § 10510(b) is a subject for a merits brief. That the court of appeals found these laws preemptive, without analysis of the statutory language and without applying the presumption against preemption, warrants issuance of a writ of certiorari.

The court of appeals has read in 49 U.S.C. § 10501(b) a sweeping invalidation of state laws, and in so doing has overlooked explicit, limiting statutory language and the pro-competitive policies enacted by Congress, contrary to the presumption against preemption and in favor of its own purposes and objectives analysis developed from non-statutory sources. Congress did not use the ICC Termination Act to displace pre-existing state laws of general application not directed at railroad operations. The court of appeals preemption analysis is fundamentally flawed, and the court should accept review of this case to clarify the proper methodology for construing express preemption clauses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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